

**Kirkpatrick & Lockhart LLP**

1800 Massachusetts Avenue, NW  
Suite 200  
Washington, DC 20036-1221  
202.778.9000  
www.kl.com

June 27, 2002

**VIA HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

205727  
**ENTERED**  
**Office of Proceedings**

**JUN 28 2002**

**Part of  
Public Record**

Edward J. Fishman  
202.778.9456  
Fax: 202.778.9456  
efishman@kl.com



**Re: Finance Docket No. 34192**  
**Hi Tech Trans, LLC – Petition For Declaratory Order**

Dear Secretary Williams:

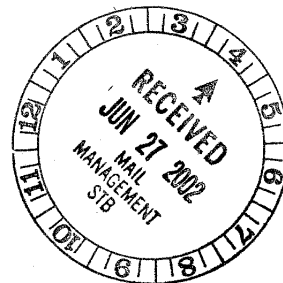
Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **State of New Jersey, Department of Environmental Protection ("NJDEP"), Reply to Hi Tech Trans, LLC Motion to Strike**. Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,  
Kirkpatrick & Lockhart LLP  
Special Counsel to the NJDEP

By:   
Edward J. Fishman

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---



FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC –PETITION FOR DECLARATORY ORDER

---

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
REPLY TO HI TECH TRANS, LLC MOTION TO STRIKE**

Kevin M. Sheys  
Edward J. Fishman  
Kirkpatrick & Lockhart LLP  
1800 Massachusetts Avenue – 2<sup>nd</sup> Floor  
Washington, DC 20036  
(202) 778-9000

**SPECIAL COUNSEL TO STATE OF NEW  
JERSEY, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION**

Dated: June 27, 2002

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC –PETITION FOR DECLARATORY ORDER

---

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
REPLY TO HI TECH TRANS, LLC MOTION TO STRIKE**

The State of New Jersey, Department of Environmental Protection (“NJDEP”), hereby submits this Reply to the Motion to Strike filed June 19, 2002 by Hi Tech Trans, LLC (“Hi Tech”). The Surface Transportation Board (“STB” or “Board”) should reject Hi Tech’s dubious request that the Board strike from the record NJDEP’s Reply to the Amended Petition for Declaratory Order filed June 6, 2002 (“NJDEP’s Reply”). The fact that Hi Tech disagrees with certain points made in NJDEP’s Reply provides absolutely no basis for striking NJDEP’s submission from the record. Hi Tech’s Motion to Strike is without merit, cumulative and itself should be stricken as an impermissible surreply under 49 C.F.R. § 1104.13(c).

In support of its request to strike NJDEP’s Reply, Hi Tech makes three assertions. First, it argues that NJDEP’s Eleventh Amendment immunity argument should be stricken from the record because of the Supreme Court’s recent holding in Verizon Maryland Inc. v. Public Service Commission of Maryland, \_\_\_ U.S. \_\_\_ (May 20, 2002). Second, Hi Tech contends that it is a “rail carrier” under the Interstate Commerce Act and therefore NJDEP’s assertion to the contrary should be stricken. Third, Hi Tech challenges an alleged assertion about the nature of construction and demolition waste that it wrongly attributes to NJDEP.

As an initial and overriding matter, the fact that Hi Tech disagrees with NJDEP’s view of the scope of its immunity under the Eleventh Amendment (or with any other argument made by

NJDEP) provides absolutely no basis to strike NJDEP's arguments from the record. Therefore, Hi Tech's motion should be rejected as an impermissible response to NJDEP's Reply in violation of 49 C.F.R. § 1104.13(c).

Even aside from its procedural infirmity, Hi Tech is plain wrong about the points that it sets forth in support of its Motion to Strike. Hi Tech once again wrongly insists that "Hi Tech is a rail carrier as that term is defined in the [Interstate Commerce] Act." Hi Tech is not a "rail carrier" as that term is defined in 49 U.S.C. § 10102(5) because Hi Tech does not provide common carrier railroad transportation. In addition, Hi Tech wrongly accuses NJDEP of asserting that construction and demolition waste is not "property" under the Interstate Commerce Act. NJDEP never made such an assertion in its Reply.

Hi Tech's assertions about the scope of Eleventh Amendment immunity are similarly flawed. Hi Tech argues that its petition should not be dismissed as violative of the Eleventh Amendment because it is seeking only a declaratory judgment against the State of New Jersey and not the imposition of any penalty against the State. The Supreme Court has explicitly and repeatedly rejected this argument:

[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. . . . The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," . . . it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

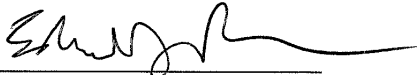
Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996)(citations omitted).

In addition, the Ex parte Young doctrine does not support Hi Tech's position for at least two reasons. First, unlike in the Verizon Maryland case, Hi Tech's petition is directed at the State of New Jersey itself. Hi Tech seeks a declaratory order "nullifying the statutes and ordinances of New Jersey which render shipping waste by rail unlawful." It is well settled that

the doctrine of Ex parte Young “has no application in suits against the States and their agencies, which are barred regardless of the relief sought.” Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. 139, 146 (1993).<sup>1</sup> Second, the Supreme Court has repeatedly stressed that the narrow exception to Eleventh Amendment immunity embodied in the Ex parte Young doctrine is necessary because of the “special obligation” of Article III courts “to ensure the supremacy of federal statutory and constitutional law.” Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 270 (1997). The limited power to abrogate Eleventh Amendment immunity through the Ex parte Young doctrine is thus a power reserved to the Article III courts, and for that reason cannot be applied by this agency against the officials of a sovereign state. Therefore, despite its best efforts, Hi Tech has failed to refute NJDEP’s argument that the Board is barred from considering the amended petition under the Eleventh Amendment.

For the foregoing reasons, NJDEP respectfully requests that the Board reject Hi Tech’s Motion to Strike NJDEP’s Reply.

Respectfully submitted,

By:   
Kevin M. Sheys  
Edward J. Fishman  
Kirkpatrick & Lockhart LLP  
1800 Massachusetts Avenue – 2<sup>nd</sup> Floor  
Washington, DC 20036  
(202) 778-9000

Dated: June 27, 2002

**SPECIAL COUNSEL TO STATE OF NEW  
JERSEY, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION**

---

<sup>1</sup> Even in those instances where, unlike here, no relief is sought against the State itself, but prospective declaratory and injunctive relief is sought against State officers named in their individual capacities, the Supreme Court has still urged great caution in the use of the Young doctrine. See Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 270 (1997) (“The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction”).

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **State of New Jersey, Department of Environmental Protection, Reply to Hi Tech Trans, LLC Motion to Strike** was served this 27th day of June, 2002 via first class mail upon:

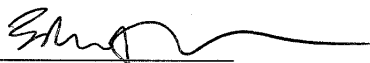
John H. McHugh  
6 Water Street  
Suite 401  
New York, NY 10004

Benjamin Clarke  
DeCotiis, Fitzpatrick, Gluck & Cole, LLP  
Glenpointe Centre West  
500 Frank W. Burr Boulevard  
Teaneck, NJ 07666

Jonathan M. Broder  
VP-Law and General Counsel  
Conrail  
2001 Market Street, 16<sup>th</sup> Floor  
Philadelphia, PA 19103

Paul Samuel Smith  
Senior Trial Attorney  
U.S. Department of Transportation  
400 Seventh Street S.W.  
Washington, D.C. 20590

Carolyn V. Wolski  
Leonard, Street and Deinard, P.A.  
Suite 2300  
150 South Fifth Street  
Minneapolis, MN 55402

  
Edward J. Fishman